

The role of NGOs in fighting discrimination: Roma rights in public education

Attorney Lilla Farkas
farkas.lilla@cfcf.hu
www.migpolgroup.com

The client group

- Roma in CEE - citizens
- Ethnic minority – minority rights framework (CoE)
- (Extreme) poverty hinders prospects for individual litigation
- Structural and institutional discrimination – patterns and trends known

NGOs protecting Roma rights

- European Roma Rights Center since 1996 (www.errc.org)
- Domestic NGOs:
 - Romani Criss
 - NEKI
 - Poradna
 - Human Rights Project
- Strategic litigation against housing discrimination of Travellers in UK

Need for NGO action

- Widespread segregation and discrimination in all fields
- System failures have disproportionate effect on Roma
- Lack of willingness to act
- Lack of expertise

ECHR case law: looking beyond the individual I.

- *Connors v the UK*: vulnerable position of Gypsies warrants special consideration of their needs arising from Gypsy way of life, and imposes positive obligation on States under Article 8
- *Cyprus v. Turkey*: Once special measures are in place for minority, they shall be maintained.

ECHR case law: looking beyond the individual II.

- D.H. and others 2007:
 - Complaint: misdiagnoses of 18 Roma children as intellectually disabled in the town of Ostrava amounts to in/direct discrimination
 - Finding: legislation and implementation led to de facto (indirect) discrimination
- at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for difference in treatment
- the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants **as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.**

ECHR case law: looking beyond the individual III.

- Minority rights based argument: necessarily focussed on ethnic minority **group**
- It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma
- the schooling arrangements for Roma children were not attended by safeguards that would ensure that ... the State took into account their **special needs as members of a disadvantaged class**

ECHR case law: looking beyond the individual IV.

- In DH and others the Grand Chamber in effect transformed the claim of 18 individual applicants into a collective complaint. It responded to 12 years of NGO lobbying and pressure from other CoE bodies to remedy the first instance judgment. However, the ECtHR failed to accord adequate remedies.
- Would this work in cases beyond Roma or ethnic minority group rights? In domestic (constitutional) courts? Before the ECJ? In action for damages?

Procedural aspects of group justice

- Collect and use existing data on discriminatory trends:
 - ethnic data from school headmasters
 - data from CoE monitoring bodies (FCNM AC, ECRI)
 - sociological research
 - NGO's statistical data
 - witness testimonies
- Identify plaintiffs and support them during litigation OR
- Litigate in NGO's own right:
 - actio popularis claims
 - administrative and criminal proceedings
 - specialised body's formal investigation
 - constitutional complaint alleging discriminatory effect of laws

Actio popularis I.

- Exists in AD law in BG, RO and HU, cf other EU MSs re consumer and environmental protection
- Necessary to fulfil obligations under Article 7.2 RED?
- Characteristics:
 - there is no need for an individual victim as the case is brought by NGOs demonstrating an interest in rights protection
 - instead of injustices suffered by and the circumstances of individual victims it focuses on patterns, trends and scenarios of discrimination
 - thus, *actio popularis* is ideal in tackling institutional, structural, or '*de facto*' discrimination

Actio popularis II.

■ Characteristics:

- *in lieu* of an individual client, there is a minimal risk of victimization - in fact no client needs to be identified for the case
- perennial costs, such as maintaining contact with the client or indeed maintaining a client service for case selection can be saved
- if a case is not about the violation of the rights of an individual victim, then remedies ought also to be tailored accordingly, ie they have to tackle 'system failures'.

NGO action: beyond litigation

- Locate committed community leaders
- Maintain trust of communities over 2 or 3 year long proceedings
- **Feed results of litigation back to communities**
- Local advocacy
- Legislative lobbying and awareness raising - **shadow reports to EU Commission (Art 17 RED)**
- Work with media